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In The
Supreme Court of the United States
October Term, 1984

ARTHUR A. SMITH and MICHAEL J. LOPEZ, individually, and doing business as SHARP-EYE ENTERPRISES, a partnership,

Petitioners,

vs.

GOLDEN WEST BROADCASTERS, INC., a California corporation, STAN CHAMBERS, LEW ROTHBART, and LAWRENCE McCORMICK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KENNETH E. KULZICK
AMY D. HOGUE
LILLICK, MCHOSE & CHARLES
707 Wilshire Boulevard
Los Angeles, California 90017
213/488-7100

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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The expression at issue in this lawsuit is some common sense advice to consumers which aired on a local television news program. The rather pedestrian story was one in a series of daily reports designed to help viewers save money. The series, appropriately entitled "Moneywatch," aired in the mid-seventies on Channel 5 in Los Angeles and always provided helpful tips to inflation-fighting viewers.

In the particular segment before the Court, Respondents publicized a would-be photo-inventory business, Sharp-Eye Enterprises. (*See text,* Petition, Appendix G) Reporter Larry McCormick characterized the service as a "good idea" and showed, with videotape footage, the special photographic skill and equipment which Petitioners used to provide their service. Consistent with the spirit of "Moneywatch," Respondents offered advice. Stated simply, viewers were advised to forego Sharp-Eye's $105 professional fee in favor of some good old fashioned elbow grease. An amateur who owned a camera and had the patience to make an inventory of his belongings could do it himself at a nominal cost.

The trial court granted Respondents' motion for summary judgment, observing as follows:

> This matter was submitted on May 3, 1983, but Court now rules as follows:
>
> The Court had announced his decision, in substance, that the subject telecast, insofar as the text presented was concerned, constituted opinion within the meaning of *Gregory v. McDonnell Douglas* (1976)

> 17 Cal.3d 596 or fair comment within the holding of *Rollenhagen v. City of Orange* (1981) 116 Cal.App.3d 414. Counsel for plaintiffs objected on the ground that the broadcast itself differed from the "script" provided and the Court agreed to and thereafter did view a tape of what was alleged to be the broadcast. There were modest differences between the script and the film. This Court rules therefore that the subject telecast represents protected opinion of the broadcaster, and summary adjudication is ordered accordingly . . . (CT 257).

The California Court of Appeal, in an unpublished opinion, upheld summary judgment concurring that the broadcast was a statement of opinion and nonactionable under any of the theories advanced by Petitioners. (Petition, Appendix E). Nothing in the determination of the trial court or in the unpublished opinion of the Court of Appeal presents a close question of law, a holding which conflicts with other courts, or an issue of constitutional proportions. This Court should accordingly deny a hearing.

I.

The Broadcast Is A Clear Statement Of Lay Opinion

In *Gertz v. Robert Welch,* 418 U.S. 323, 339-340 (1974), the Court stated that expressions of opinion are absolutely protected from liability. False statements of fact are qualifiedly privileged and may be a basis for liability only if the defendant knows of the falsity before publication, in the case of a public figure plaintiff, or, in the case private figure plaintiff, the defendant acted with the requisite degree of fault defined under state law. *Id.* at 342-48. In the nine years since *Gertz,* courts have dis-

tinguished between expressions of opinion and false statements of fact "treating the one as constitutionally protected and imposing on the other civil liability for its abuse." *Gregory v. McDonnell Douglas Corp.,* 17 Cal. 3d 596, 600-01 (1976). The *Gertz* Court's now familiar language describing the distinction states:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. 418 U.S. 323, 339-40.

In California, the determination whether a statement is fact or opinion is an issue of law. *Okun v. Superior Court,* 29 Cal.3d 442, 450 (1981); *Gregory v. McDonnell Douglas, supra.*

The distinction between constitutionally protected opinion and allegedly defamatory fact can, of course, be elusive when the publisher intimates special knowledge or expertise about the plaintiff or his business. But unlike the consumer report at issue in *Bose Corporation v. Consumers Union,* — U.S. —, 104 S.Ct. 1949 (1984), the common sense advice in Respondents' broadcast does not "tread the line between fact and opinion." *See also, Ollman v. Evans,* 750 F.2d 970 (1984) *cert. denied,* — U.S. — (1985).

In determining whether an allegedly defamatory statement is nonactionable, the Court must carefully examine the statement and the totality of circumstances in which it was uttered. *Information Control v. Genesis I Computer Corp.,* 611 F.2d 781, 784 (9th Cir. 1980). The Court must consider all of the words, not merely a phrase or sentence, and give weight to the cautionary terms used

by the speaker. *Id.* at 784. Finally, the Court must weigh the circumstances surrounding the statement, such as the medium in which the statement is disseminated and the audience to whom it is addressed. *Id.*

California courts have applied these rules to distinguish between opinions which may be actionable and those which clearly are not. For example, in *Slaughter v. Friedman,* 32 Cal.3d 149 (1982), the California Supreme Court held that an insurance company's statements in a letter denying coverage that work performed by the plaintiff dentist was "unnecessary" and that the dentist was "overcharging" were *actionable* statements of opinion. The court observed as follows:

> Although accusations of 'excessive' fees or 'unnecessary' work when made by laymen might indeed constitute mere opinion, similar accusations by professional dental plan administrators carry a ring of authenticity and reasonably might be understood as being based on fact. 32 Cal.3d at 154.

Respondents' sensible advice to "do it yourself" carries no such ring of expertise. This was not, for example, a technical article in *Photography Today* which criticized Petitioners' skill. Reporter Larry McCormick, who read the piece, also read the rest of the news. He was the overall evening news anchorman, not a consumer specialist. The story was more like *Heloise's Helpful Hints* than *Consumers Reports Magazine* or David Horowitz' *Fight Back.*

Indeed, the rather straightforward purpose of Respondents' consumer news feature was "to help people save money and to get more value for their money when

they did spend it." (Executive Producer Lew Rothbart, CT 90). Phrases such as "look what you're paying for and don't pay more than it's worth" were used at the conclusion of nearly every one of the "Moneywatch" reports. (Executive Producer Lew Rothbart, CT 91). As the name suggested, Respondents' daily series helped consumers to watch their money. Not only did the tenor of "Moneywatch" put Petitioners on notice that opinions *helpful to consumers* would be broadcast, but it also conditioned viewers to expect advice.

Qualifying words and phrases, which shaped the context in which the statements were made and signaled that the statements were opinion, were liberally sprinkled throughout the broadcast. *See, Information Control v. Genesis I Computer Corp., supra.* On-air Reporter, Larry McCormick said, "In this instance they're asking *what we consider to be* way too much for it in monetary return"; "they want you and me to pay *or actually overpay—we might as well say it, about* ten times the value of this service"; "*I can see how it might be* helpful to you, *I don't see how* it could discourage a burglar"; "*In most cases,* you could do the job yourself for just a fraction of the cost"; "*some good advice anytime*—inasmuch here on 'Moneywatch,' *we always try to save you money* in those areas where a little of your own elbow grease and *a little work on your part can save you money*"; and "*that's what we are here for on 'Moneywatch'—tonight has been one example.*" All of these qualifying words indicate to any reasonable person that the story is one of advice and opinion. A viewer might well conclude that $105 was a small price to pay compared with the inconvenience of elbow grease.

The actual statements of fact in Respondents' broadcast were entirely innocuous. They are as follows:

1. "The idea [of plaintiffs' business] is photographing your household belongs for insurance and security purposes."

2. "The insurance companies are in favor of it and so, for that matter, are the police."

3. "Sharp-Eye Enterprises—that's not really the name."

4. "They offer to come into your home and take one roll of slides, that's a total of 36 pictures."

5. "Along with that they provide a written inventory of all of the items photographed. It is not an appraisal."

6. "Included in this package are four window stickers saying your house has been inventoried."

7. "The charge for the basic service or plan is . . . $105."

8. "They also offer other plans as well, each of them succeedingly more expensive, ranging all the way up to $800."

9. "They do offer . . . a videotape recording of your homesite and belongings which could, for example, better show any nearby fire hazard."

The essential facts in the broadcast are undisputed: Sharp-Eye proposed to charge $105 for taking one roll of slides, providing a written inventory, four window stickers, and keeping the inventory in a "safe place".

Courts have consistently acknowledged that a statement is not actionable just because it is unpleasant, critical, or hostile. *See, Botos v. The Los Angeles Bar Association,* 151 Cal.App.3d 1083 (1984) (holding that a publication by the Bar Association which rated a judicial candidate as "not qualified" is a statement of opinion and not actionable); *Kaufman v. Fidelity Savings & Loan Association,* 140 Cal.App.3d 913 (1983) (holding that a letter sent by a savings and loan association to its customers which accused the plaintiff, a banker of resisting a zoning change simply to thwart his competitor, was a statement of opinion and not actionable); *Lewis v. Ueberroth,* 147 Cal.App.3d 442 (1983) (holding that the defendant's statement in a magazine interview that plaintiffs were not "well meaning" but instead wanted to "further their identification" and should be investigated to find out, "where did all the money go that was paid them" were all nonactionable statements of opinion); *Washburn v. Wright,* 261 Cal.App.2d 789, 796 (1978) (labelling an individual as an "extremist" is not actionable); *Sullivan v. Warner Bros. Theatres,* 42 Cal.App.2d 660, 663 (1941) (labelling someone as "disloyal" is not actionable). The opinion that Sharp-Eye's services were overpriced, although unpleasant to Petitioners, is no different than a critic's unflattering review of a motion picture. Viewers expect a critic to critique and may accept or reject his view. The "Moneywatch" viewers could similarly decide that $105 was not unreasonable for a professional photo-inventory.

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